

4 Official Opinion of the Compliance Board 188 (2005)

**EXECUTIVE FUNCTION EXCLUSION – DISCUSSION BY
COUNTY COMMISSIONERS OF LIBRARY SYSTEM
PERSONNEL ISSUES, HELD TO BE OUTSIDE THE
EXCLUSION – EXCEPTIONS PERMITTING CLOSED
SESSIONS – PERSONNEL –DISCUSSION BY COUNTY
COMMISSIONERS OF LIBRARY SYSTEM PERSONNEL
ISSUES, HELD TO BE WITHIN THE EXCEPTION – CLOSED
SESSION PROCEDURES – WRITTEN STATEMENT –
BRIEF PHRASES ABOUT TOPICS TO BE DISCUSSED
PERMITTED**

December 16, 2005

Craig O'Donnell
Kent County News

The Open Meeting Compliance Board has considered your complaint that the Board of County Commissioners of Kent County violated the Open Meetings Act on July 26 and August 23, 2005, when it met in closed sessions concerning personnel matters involving employees of the Kent County Library System.

For the reasons explained below, we find that the County Commissioners' discussions concerning library system personnel did not involve an "executive function" outside the scope of the Act. However, the County Commissioners properly invoked the Act's personnel exception to close the meetings. Moreover, the information provided in the written statements satisfied the requirements of the Act. Whether the statement in connection with the July 26 meeting was completed in a timely manner, however, is an issue we cannot resolve.

I

Complaint and Response

A. Allegation of Improperly Closed Meetings

The County Commissioners held a closed session on July 26, 2005, to discuss a series of items, all apparently pertaining to personnel matters. The statutory basis for the closed session was §10-508(a)(1)(ii).¹ According to the "Topics to be

¹ Unless otherwise noted, all statutory references are to the Open Meetings Act,
(continued...)

Discussed” entry in the written statement prepared in connection with the closed session, one of the items was “issues relating to hiring at the Public Library.”

The complaint provided additional detail about the August 23 meeting. As evidenced by the written statement and publicly available minutes of the County Commissioners’ meeting, the Commissioners met in closed session with Mr. Blake, president of the Board of Library Trustees, and Mr. Keiser, the Library System’s Assistant Director. Following the closed session, an announcement was made that Mr. Keiser was now the director of the library system. According to the complaint, “[p]resumably the former director’s resignation had already been accepted by the [Library] Trustees, and Mr. Keiser already accepted the job.” The complaint noted that, under State law, hiring and disciplinary power over library employees lies with the Library Board of Trustees. When questioned about the Commissioners’ involvement in this matter, apparently the County Administrator cited the County’s role in funding the Library System. Afterwards you were told that “another law required the session be closed anyway.” However, the Commissioners did not refer to any statutory provision other than §10-508(a)(1)(ii) when they voted to close the meeting.

As to both meetings, the complaint questioned the propriety of the County Commissioners’ meeting in closed session to consider a personnel matter involving employees of the Kent County Library System since these individuals are not County employees. Specifically, the complaint questioned “whether §10-508(a)(1)(ii) is intended to cover discussions where the individuals are outside of the public body’s jurisdiction.”

B. Allegation of Improperly Prepared Statements

The complaint alleged that the written statement prepared in connection with the July 26 closed session was inadequate because, under the heading “Topics to be Discussed,” the statement listed “issues relating to hiring at the Public Library.” The complaint objected that this formulation made it impossible to distinguish whether the topics were interrelated. The complaint also objected to both statements’ use of “[c]ryptic constructions” instead of complete sentences. Finally, according to the complaint, the July 26 statement was prepared after the fact, and, until August 2005, the County Commissioners did not prepare a written statement prior to closing meetings.

¹ (...continued)

Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

C. Commissioners' Response

1. Events leading to the closed sessions

In a timely response on behalf of the Kent County Commissioners, Thomas Yeager, County Attorney, and Susanne Hayman, County Administrator, provided a description of events at the Library relating to your complaint. According to the response, concerns relating to personnel practices at the library and the effect on particular staff were brought to the attention of William Pickrum, President of the Board of County Commissioners, before the July 26 session. The employee raising the concerns was referred to the Library Board of Trustees, but Mr. Pickrum shared the information he heard with his colleagues on the Board of County Commissioners on July 26 during a session closed to the public to consider various County personnel matters.² In light of subsequent developments at the library and limited communications from the Library Board of Trustees, the County Commissioners asked Jim Blake, president of the Board of Trustees, to meet with them.

2. Response on the legality of the closed sessions

Mr. Yeager and Ms. Hayman suggested that the sessions at issue were outside the scope of the Open Meetings Act. The response addressed the County Commissioners' role under the State's education law in appointing the members of the Library Board of Trustees and the level of County funding. However, characterizing the exclusions under §10-503 of the Open Meetings Act as the equivalent to the "rule against perpetuities,"³ the County Commissioners relied instead on §10-508(a)(1)(ii) as the basis for closing the meeting. While noting that reliance on the latter provision was perhaps erroneous, "[t]he Kent County Commissioners feel very strongly ... that it is in the interest of the county for the board [of county commissioners] to be able to receive information and discuss outside of a public forum, subjects like those [addressed in the complaint], and that it is not against the law for them to do so."

² Minutes of this session were provided along with the response, with the understanding that the minutes will be kept confidential in accordance with §10-502.5(c)(2)(iii).

³ The "rule against perpetuities" is the principle that no interest in property is good unless it must vest, if at all, not later than 21 years, plus period of gestation, after some life or lives in being at time of creation of interest. *Perkins v. Iglehart*, 183 Md. 520, 526, 39 A.2d 672 (1944). The Supreme Court of California has described the rule as "a technicality-ridden legal nightmare" and noted that "few, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary." *Lucas v. Hamm*, 56 Cal.2d 583, 592, 364 P.2d 685 (1961) (internal cites omitted).

3. *Response on the statements*

The County Commissioners appear to acknowledge that before July 26, 2005, they did not produce a written statement signed by the presiding officer in advance of closing a meeting, but then started using the form suggested by the Attorney General. However, they dispute the suggestion that specific information in connection with closed sessions was not provided before that date, since the practice had been for the presiding officer to state orally the reason a meeting was being closed. By August, 2005, according to the response, any procedural deficiency was corrected. With respect to the August 23 meeting, a separate written statement was completed, albeit with an erroneous date, August 25, 2005, as reflected in the complaint.⁴

II

Analysis

Your complaint raised two issues about these closed meetings. The first is substantive: Did the County Commissioners violate the Act in conducting closed meetings to address personnel matters involving employees of the Library System, since these employees are not County employees? The second is procedural: Were the written statements prepared in connection with the closed sessions adequate?

In light of the County Commissioners' response, however, we must first address a preliminary matter: whether the discussions involved an executive function outside the scope of the Act. *See, e.g., 3 Official Opinions of the Maryland Open Meetings Compliance Board 227, 229 (Opinion 02-12) (2002) (Compliance Board must consider public body's argument that session involved executive function even if not raised in advance of the closed session).*⁵ The County Commissioners obviously treated the sessions as if the Open Meetings Act applied. Nonetheless, if the sessions did involve an executive function, neither the substantive nor procedural requirements of the Act would have applied, § 10-503(a)(1)(i),⁶ and no violation of the Act could have occurred.

⁴ However, this statement differed from that submitted with the complaint; the latter document was intended to cover other personnel matters considered during the course of the closed session. A copy of the written statement prepared in connection with the library issues and confidential minutes of the August 23 session were provided along with the response.

⁵ For brevity's sake, we shall henceforth refer to the volumes of our former opinions as *OMCB Opinions*.

⁶ While there are exceptions to this exemption, namely, the granting of a license or permit or any zoning matter, these exceptions are clearly not relevant to the sessions at issue.

A. Executive Function Exclusion

An “executive function” is defined as follows:

- (1) “Executive function” means the administration of:
 - (i) a law of the State;
 - (ii) a law of a political subdivision of the State; or
 - (iii) a rule, regulation, or bylaw of a public body.
- (2) “Executive function” does not include:
 - (i) an advisory function;
 - (ii) a judicial function;
 - (iii) a legislative function;
 - (iv) a quasi-judicial function; or
 - (v) a quasi-legislative function.

§10-502(d). Applying the executive function exclusion requires a two-part analysis: First, does the topic of discussion fall within the definition of any other defined function? If it does, it cannot be an executive function. Second, does the discussion involve “the administration of” a state or local law or a public body’s rule, regulation, or bylaw? If not, it cannot be an executive function.

The authority to establish a county library system rests with the County Commissioners, and State aid for libraries is conditioned on sufficient county funding in accordance with a formula set forth in State law. Education Article, §§23-401(a) and 23-501, *et seq.*, Annotated Code of Maryland. Consequently, there is no question that the County Commissioners have a legitimate interest in the library’s use of County tax dollars. Had the Commissioners met with the Board of Trustees concerning the administration of the current year’s budget, we would agree that the meeting would have involved an executive function under the Open Meetings Act. *See* 1 *OMCB Opinions* 23, 24 (Opinion 93-2) (1993) (discussion between board of county commissioners and county board of education regarding implementation of previously adopted budget, not involving budget amendment, was an executive function).

Authority over library operations, however, including personnel matters, is vested by law in the Library Board of Trustees. *Id.*, §§23-401(b) and 23-406. The personnel issues addressed during the County Commissioners’ meetings dealt with operational matters over which the Board of Trustees, not the County Commissioners, exercised control. Considering that State law vests operational responsibility in the Library Board of Trustees, and the absence of any law which the County Commissioners might be said to have been “administering,” we conclude that the discussion of library personnel matters during the closed meetings did not meet the Open Meeting Act’s definition of an executive function. *See, e.g.*, 4 *OMCB*

Opinions 163 (2005) (local board of education could not rely on the executive function exclusion in situation where the Governor, rather than the local board, is charged with filling mid-term vacancy on the board.).

B. Personnel Exception

A public body may close a meeting to address personnel matters only to discuss:

(i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials over whom it has jurisdiction; or

(ii) any other personnel matter that affects 1 or more specific individuals;

§10-508(a)(1).⁷ The first of these two provisions, subparagraph (i), does not apply. The library director is an employee over whom the Library Board of Trustees, not the County Commissioners, “has jurisdiction.”

⁷ The current statute does not differ significantly from the original Act. Former Article 76A, §11(a)(1) read:

A public body required to have an open meeting by [Article 76A, §10] may have a closed meeting, or may adjourn an open meeting into closed session for any of the following purposes, but not otherwise:

(1) discussion of the employment, assignment, appointment, promotion, demotion, compensation, discipline, removal, or resignation of employees, appointees, or officials over whom it has jurisdiction, or any other personnel matter affecting one or more particular individuals;

...

Chapter 863, Laws of Maryland 1977. A bill passed the previous year, but vetoed by Governor Mandel, differed slightly and did not include the phrase “over whom it has jurisdiction.” Senate Bill 289 (1976). However, a review of the available legislative history of the 1977 legislation did not reveal the reasons for the rewording. While one might argue that the later subtabulation of this item supports the broader reading of the statute, the subtabulation was the result of the recodification of the Open Meetings Act in 1984 as part of the enactment of the State Government Article. The accompanying revisor’s note made clear that no substantive change was intended.

Turning to subparagraph (ii), the discussion among the County Commissioners, Mr. Blake, and Mr. Keiser obviously involved a “personnel matter.” Was it a matter that “affect[ed] 1 or more specific individuals”? One’s immediate reaction is to say that of course it did, the specific individual who was the library director and the individuals who might take over that position. But this begs a question of statutory interpretation: whether the General Assembly meant to allow a closed meeting whenever discussion of personnel issues affect one or more specific individuals, without regard to whether the public body exercises jurisdiction over the employees involved; or whether the “any other personnel matter” provision was meant to be read more narrowly, so that it covered the waterfront of personnel issues beyond the ones enumerated in the first provision, but only if the “specific individuals” fall under the public body’s jurisdiction, just as in the first provision.⁸

The reason for the personnel exception in the Act is to protect the privacy of employees. Office of the Maryland Attorney General, *Open Meetings Act Manual*, p. 27 (5th ed. 2004). That is also the reason why personnel records are *prohibited* from disclosure under the Maryland Public Information Act. State Government Article, §10-616(i). Hence, when the County Commissioners discussed the library personnel situation, to the extent that any information was derived from the personnel records of the employees in question, the County Commissioners would have been required to invoke the “other law” exception in §10-508(a)(13), in order to “comply with a specific ... statutory ... requirement that prevents public disclosure about a particular ... matter.” But how would they have known exactly what piece of information came from a personnel record and what from some other source? Even if a public body could somehow figure that out, it would be obliged, when discussing the personnel situation of a specific individual over whom it lacked jurisdiction, to move in and out of closed session depending on whether the content of their discussion is derived from a personnel record. It is highly unlikely that the General Assembly meant to force public bodies into such an awkward and unrealistic gyration. Much more reasonable is to suppose that the General Assembly intended the second provision to apply as its literal language suggests: Whenever an

⁸ Why might one read the second provision as if it contained the jurisdictional limitation, although the language is not spelled out, as it is in the first provision? One basis for this possible interpretation is a principle of statutory construction known as the *ejusdem generis* doctrine. This rule applies when (1) the statute contains an enumeration by specific words, (2) the members of the enumeration suggest a class, (3) the class is not exhausted by the enumeration, (4) a general reference supplements the enumeration, usually following it, and (5) there is not clearly manifested an intent that the general term be given a broader meaning. *Boyle v. Maryland-Nat’l Capital Park and Planning Comm’n*, 385 Md. 142, 156, 867 A.2d 1050 (2005) (internal citations omitted). In this case, for example, the doctrine would lead us to conclude that the term “other personnel action” in the second provision covers the same class of decisions as the more specific enumeration in the first. One might also argue that the phrase “specific individuals” in the second provision covers the same class of individuals as the more specific enumeration in the first, those under the public body’s jurisdiction. As we explain in the text, however, given the context of other relevant law, we think that the phrase needs to be given a broader meaning.

individual's personal work attributes or similar specific matters are under discussion, regardless of the entity having jurisdiction over the individual, the individual's privacy may be protected by closing the meeting.

Thus, in our opinion, the County Commissioners' reliance on §10-508(a)(1)(ii) to hold closed-session discussions of library personnel was justified.⁹

C. *Written Statements*

1. *Timing*

The complaint suggested that the written statement required to be completed in advance of a closed meeting under §10-508(d)(2)(ii) was not completed before the July 26 closed session, but was prepared after the fact. According to the complaint, the County Commissioners did not begin completing written statements in advance of closed meetings until August 2005. The County Commissioners admitted that prior to a meeting with representatives of the *Kent County News*, their procedures did not include completion of a written statement before entering a closed session under the Act. Consequently, they were not in compliance with the Act's procedural requirements. *See* 10-508(d)(2)(ii). However, the response suggested that this deficiency had been remedied by July 26.

This is a factual issue that we are unable to resolve. If the statement was completed immediately in advance of the closed session on July 26, no violation occurred. If it was not completed immediately before the closed session, the County Commissioners violated the Act. *See, e.g., 3 OMCB Opinions* 4, 6 (Opinion 00-2) (2000).

2. *Content*

Finally, the complaint takes issue with the manner in which information was provided under the heading "Topics to be Discussed." According to the complaint, the listing of a series of issues to be discussed in closed session makes it impossible to tell whether those items are interrelated. The written statement, even when reviewed with the publicly available minutes, does "not illuminate why the sessions needed to be closed." It was suggested that complete sentences be provided in explaining topics to be discussed.

While complete sentences might well often improve comprehension, the Open Meetings Act simply does not require this manner of presentation. The Act requires "a written statement of the reason for the closed meeting, including a citation of the authority under [§10-508], and *a listing of topics to be discussed.*"

⁹ Of course, we express no opinion as to the propriety of a member of the Library Board of Trustees discussing library personnel with the County Commissioners. Our opinion is limited, as it must be, to the interpretation of the Open Meetings Act.

§10-508(d)(2)(ii). As we have previously explained, the written statement serves several objectives. First, it gives the public body one last opportunity to consider whether a closed session really is necessary. Second, it helps members of the public who will be kept out of the closed session understand that the exception to the principle of openness is well-grounded. Finally, it is an accountability tool, for an interested observer can compare the written statement and the publicly available summary of what actually occurred and infer whether the public body hewed to the topic that justified the closing. 4 *OMCB Opinions* 46, 48-49 (2004).

In applying the statute, we have frequently advised that the written statement is not expected to include a level of detail that would defeat the desired confidentiality underlying a closed session; however, mere parroting the applicable statutory exception is not enough. 4 *OMCB Opinions* 38, 41-42 (2004). To be sure, a series of items reflected in a single topic statement may blur the individual justifications. However, we have long recognized that the scheduling of several topics as part of a single closed session is not inappropriate and may be more convenient from the perspective of the public. *See, e.g., 3 OMCB Opinions* 264, 268 (Opinion 03-4) (2003).

The statement completed for the July 26 meeting cited the applicable statutory provisions and listed the topics to be discussed. Germane to the complaint, it listed “issues related to hiring at the Public Library.” From the full record, we interpret this matter as addressing one or more specific employees. Similarly, the written statement completed on August 23 in connection with the library matters satisfied the minimal procedural requirements of the Act. While the information provided was limited, it went beyond mere parroting of the statutory exemption. Although no additional information was provided under the heading “reason for closing,” the reasoning was implicit in the information disclosed. Thus, substantial compliance with the Act was achieved.

III

Conclusion

In summary, we hold that the Kent County Board of County Commissioners complied with the Open Meetings Act by meeting in closed session justified under §10-508(a)(1)(ii) to consider specific personnel issues related to the Kent County Library System. Moreover, the information provided in the written statements required in connection with a closed meeting satisfied the Act. Whether the form was completed in a timely manner in advance of the closed session on July 26, as the County Commissioners’ response suggested, or was completed after the fact, as suggested in the complaint, is an issue we cannot resolve.

OPEN MEETINGS COMPLIANCE BOARD

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